UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MARRIOTT INTERNATIONAL, INC., D/B/A
J.W. MARRIOTT LOS ANGELES AT L.A. LIVE

and Case No. 21-CA-39556

UNITE HERE! LOCAL 11

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Dated: September 9, 2011

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Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Respondent Marriott International Inc., d/b/a J W. Marriott Los Angeles at L.A. Live ("Marriott") submits the following Brief in support of its Exceptions to the July 22, 2011 Decision of Administrative Law Judge Clifford H. Anderson ("the ALJ") in the above-captioned matter.[1]

I. INTRODUCTION & STATEMENT OF THE CASE

On January 27, 2011, Region 21 issued a Complaint alleging that Marriott violated Section 8(a)(1) of the Act by maintaining two work rules which purportedly chill employee Section 7 rights on their face. [GC Ex. 2, ¶¶ 9, 11.][2] A hearing was held on April 20, 2011; and, on July 22, 2011, the ALJ held that Marriott violated Section 8(a)(1) by maintaining the "Returning to Work Premises" and the "Use of Hotel/Property Facilities" rules at issue.

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[1] Citations to the record are as follows: the ALJ's decision is cited as "Decision [Page]:[Lines]"; the hearing transcript as "Tr. [Page]:[Lines]"; the General Counsel's exhibits as "GC Ex. [Number]"; and Marriott's exhibits as "Resp. Ex. [Number]."

[2] The parties resolved all allegations of the Complaint except for Paragraphs 9, 11, and 12. [See GC Exs. 1 (Complaint) and 2 (Amended Complaint).] At the hearing, the General Counsel further revised the Amended Complaint to allege that both Marriott's initial "California Associate Handbook" as well as its subsequently issued "L.A. Live Employee Handbook" contain these purportedly unlawful rules. [Tr. 47-48.]

As will be more fully explained below, the ALJ's findings should not be adopted because, among other things, he disregards the following key undisputed facts: (1) there is no evidence that Marriott applied the rules in a manner that restricted Section 7 rights; (2) there is no evidence that Marriott promulgated the rules in response to union activity; (3) there is no evidence that even a single employee ever believed the rules prohibit Section 7 activity; and (4) there is no evidence that Marriott has ever disciplined any employee for engaging in Section 7 activity on or off of its property. Accordingly, no reasonable employee would view the policies and believe that they would need to obtain Marriott's permission to conduct Section 7 activity. Instead, employees would view the rules for what they are — policies to limit off-the-clock work, ensure employee safety, maintain an efficient workplace, and foster an enjoyable experience for Marriott guests.

II. STATEMENT OF FACTS

A. Marriott Initially Distributed A "California Associate Handbook" To New Hires.

On February 15, 2010, Marriott opened the property at issue — the J.W. Marriott Los Angeles, located at L.A. Live. [Tr. 35.] Marriott hired approximately 400-500 initial employees and conducted new hire orientations in late January and early-February 2010. [Tr. 35-36, 37-38.] As part of the orientation process, employees were provided a copy of the Marriott's "California Associate Handbook" [Tr. 36-37; Resp. Ex. 1] and subsequently met with Union representatives in accordance with the terms of a neutrality and card check agreement. [Tr. 38-39.]

The "California Associate Handbook" contained the following two work rules alleged as violative of the Act in the Amended Complaint:

> Returning to Work Premises
>
> Associates are not permitted in the interior areas of the hotel more than fifteen minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to

> interior areas of the hotel after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside non-working areas. [Resp. Ex. 1, p.6.]
>
> Use of Hotel Facilities
>
> The hotel and its facilities are designed for the enjoyment of our guests. If you wish to use the guest facilities during non-working hours, you need to obtain prior approval from your manager. [*Id*.]

B. Marriott Issued A Revised "L.A. Live Employee Handbook" Shortly After Opening.

A few months after opening the L.A. Live property, Marriott issued a revised employee handbook. [Tr. 39; Resp. Ex. 2.] This handbook was created specifically for the L.A. Live property because it is the only Marriott location that contains a J.W. Marriott and a Ritz Carlton in the same premises. [Tr. 39-40.] The L.A. Live handbook slightly modified the work rules at issue:

> Returning to Work Premises
>
> Employees are not permitted in the interior areas of the Property more than fifteen (15) minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the Property after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside non-working areas. [Resp. Ex. 2, p.43.]
>
> Use of Property Facilities
>
> The Property and its facilities are designed for the enjoyment of our guests and residence owners. You are not permitted on guest or resident floors, rooms or elevators, in public restaurants, lounges, restrooms, or any other guest or resident facility unless on a specified work assignment or with prior approval from your manager. Permission must be obtained from your manager before utilizing any Property outlet, visiting family or friends staying in

> the Property, or using any of the above mentioned facilities. Please ensure that the manager of the area you intend to visit is aware of the approved arrangements. [*Id*. at p. 44.]

Marriott began distributing the revised L.A. Live handbook to employees hired after November 2010, but did not find the modifications significant enough to warrant requiring all existing employees to acknowledge receipt of the new handbook. [Tr. 41, 43.][3] Marriott has hired over 100 employees since the revised L.A. Live handbook was issued and each of these new hires were provided the revised handbook. [Tr. 43.] In addition, several of the employees hired prior to November 2010 also requested a copy of the revised handbook from human resources. [Tr. 44.]

C. Marriott Has Legitimate Business Reasons For Maintaining The Instant Rules.

Marriott maintains the work rules at issue for several legitimate business reasons. The "Use of Hotel/Property Facilities" rule is intended to limit employee use of facilities which are designed for the enjoyment of guests. [Tr. 44-45.] It ensures that sufficient space is available for guests — from whom the hotel derives its essential revenue — to use such facilities. [*Id*.] The rule is particularly important during periods when the hotel is at peak capacity, such that employee use could affect availability of the facilities for guests.

Furthermore, the "Returning to Work Premises" rule is important to Marriott in order to preclude off-the-clock employees from disrupting or interfering with the work of employees who are on-the-clock. [Tr. 46.] The rule is also intended to limit potential accidents and workers' compensation claims involving off-the-clock employees. [Tr. 45, 57.] In addition, the

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[3] Marriott's initial "California Associate Handbook" notified employees that the "Company reserves the right to modify, change, disregard, suspend, or cancel at any time, without written or verbal notice, all or part of the handbook's contents as circumstances may require." [Resp. Ex. 1, p. 4.]

"Returning to Work Premises" rule helps limit potential wage-hour and other legal liabilities in the event that a guest seeks assistance from off-duty employees who may still be in uniform. [*Id*.]

Neither of these rules reference or expressly implicate Section 7 activity [*see* Resp. Exs. 1, 2], nor do they have a purpose of affecting the right of employees to unionize or conduct union activity. [Tr. 46] In fact, Marriott signed a neutrality agreement and recognized the Union shortly after the initial handbook was distributed to employees. [*Id*.]

III. QUESTIONS PRESENTED

As set forth in Marriott's exceptions, the questions presented to the Board are as follows:

- Did the ALJ erroneously conclude that Marriott's original and revised "Returning to Work Premises" rules violate the Act because his conclusion was based on one or more of the following flawed findings:

  (1) he improperly found that *Tri-County Medical Center*, 222 NLRB 1089 (1976) stands for the broad proposition that any no access rule (even one that specifically excludes outside non-working areas) is invalid if management has discretion to make limited exceptions and it is not uniformly applied to all employees "seeking access to the plant for any purpose" [Exception No. 3.]

  (2) he improperly disregarded any review or analysis of *Crowne Plaza Hotel*, 352 NLRB 382 (2008), which is directly on point and would hold that Marriott's "Returning to Work Premises" rules are valid. [Exception No. 4.]

  (3) he improperly misinterpreted *Lafayette Park Hotel*, 326 NLRB 824 (1998) to find that its holding is only limited to restrictions placed on hotel food and beverage outlets. [Exception No. 5.]

  (4) he improperly failed to explain how employees would be "further" confused about the "scope of the access restriction rule" because of the term "property" in the revised "Returning to Work Premises" rule even though the rule explicitly contains an exception for parking areas and other outside non-working areas on the property. [Exception No. 6.]

- Did the ALJ erroneously conclude that Marriott's original and revised "Use of Hotel/Property Facilities" rules violate the Act because his conclusion was based on one or more of the following flawed findings:

  (1) he improperly failed to consider that Marriott's "Use of Hotel/Property Facilities" rule pertains to off-duty employees who want to use the hotel facilities like any other guest of the hotel and, under such circumstances, there would be no confusion regarding Section 7 rights. [Exception No. 8.]

  (2) he improperly failed to read Marriott's "Use of Hotel/Property Facilities" rule together with its "Returning to Work Premises" in accordance with Board authority on interpretation of workrules. [Exception No. 11.]

  (3) he improperly failed to consider evidence which revealed that Marriott does not have any guest facilities outside of its property and that the outside patio connected to the mixing-room bar area is simply an extension of the hotel's mixing-room bar because it is surrounded by a gate which separates it from the public. [Exception Nos. 12-13.]

- Did the ALJ erroneously conclude that Marriott's original and revised "Returning to Work Premises" and "Use of Hotel/Property Facilities" rules violate the Act because he did not consider the following facts:

  (1) there is no evidence that Marriott applied the rules in a manner that restricted the exercise of Section 7 rights;

  (2) there is no evidence that Marriott promulgated the rules in response to union activity;

  (3) there is no evidence that even a single employee ever believed the rules prohibit Section 7 activity;

  (4) there is no evidence that Marriott has ever disciplined an employee for conducting Section 7 activity on or off of its property; and

  (5) there is no evidence that employees could not use Marriott's open door policy to clarify the scope of the rules. [Exception Nos. 1-2, 9-10.]

- Did the ALJ erroneously conclude that Marriott's original and revised "Returning to Work Premises" and "Use of Hotel/Property Facilities" rules violate the Act because they were not clearly disseminated to all employees. [Exception Nos. 7, 14.]

- Did the ALJ erroneously reach a proposed order and remedy which is premised on inappropriate findings of fact and law.

IV. ARGUMENT

The Board has held that an employer violates the Act only if it maintains a rule that "*would reasonably* tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (emphasis added). Here, the undisputed evidence is that the rules at issue do not explicitly restrict Section 7 activity. Therefore, a violation would be dependent upon the General Counsel showing of one of the following: (1) the rule was promulgated in response to union activity; (2) the rule has been applied to restrict the exercise of Section 7 rights, or (3) employees would reasonably construe the language to prohibit Section 7 activity. *See, e.g., Martin Luther Memorial Home*, 343 NLRB 646, 646-647 (2004).

The Amended Complaint in no way alleges — and the General Counsel did not submit any evidence — that the rules were implemented in response to union activity, or were improperly applied to employees. Therefore, the only issue properly before the ALJ was whether employees reasonably would construe the language in the two work rules to prohibit Section 7 activity — based solely upon a facial review of the rules. For the reasons discussed below, the ALJ's decision should not be adopted and the Amended Complaint dismissed.

A. The ALJ Improperly Concluded That Marriott's "Returning To Work Premises" Rule Is Unlawful.

The ALJ found that Marriott's "Returning to Work Premises" Rule is unlawful because it gives management discretion to allow some off-duty employees to return to the hotel in violation of *Tri-County*, 222 NLRB at 1089. [Decision at 5:7-17, 7:16-17.] In reaching this conclusion, the ALJ made several erroneous factual and legal findings. Among other things, the ALJ ignores the fact that Marriott has expressly adopted language to comply with *Tri-County* and also ignores the significant precedent that has previously considered and rejected the ALJ's conclusion.

1. The ALJ Misinterpreted And Completely Ignored Board Authority Upholding Rules Similar To Those Maintained By Marriott.

The ALJ's decision erroneously ignored any review or analysis of *Crowne Plaza Hotel*, 352 NLRB 382 (2008), which is directly on point and would hold that Marriott's "Returning to Work Premises" rules are valid. In *Crowne Plaza Hotel*, the General Counsel argued that the following rule was unlawful because it denied employees access to outside non-working areas and because it allowed a manager to select which employees could use the facilities:

> You should only be at the hotel during scheduled work hours. When you have punched out at the end of your shift, *please leave the building promptly*. Any employee caring to visit the hotel during non-work hours *must first obtain permission from the General Manager*. If an employee would like to patronize any of the food and beverage outlets, they may do so only with the prior permission of the General Manager.

Id. at 385 (emphasis added). On summary judgment, the Board rejected each of these arguments. The Board held that employees would not construe such a rule to deny access to outside non-working areas because the rule's second sentence requires that employees leave "the building" at the end of their shift. *Id*. The Board further held that "a reasonable employee *would not interpret this rule as requiring prior approval for Section 7 activity*" because it did not mention Section 7 activity and there were legitimate business reasons for a rule requiring off-duty employees to obtain permission before entering the premises. *Id*. (*citing Lafayette Park*, 326 NLRB at 827) (emphasis added). While *Crowne Plaza Hotel* was based on a 2 member majority, nothing suggests that the reasoning of the decision, or the current state of the law was wrongly stated and the ALJ should have considered the opinion in his decision.

The reasoning of *Crowne Plaza Hotel* was also adopted by the ALJ in *Jurys Boston Hotel*, 356 NLRB No. 114, p. 15 (2011), which found that the following two rules were valid:

> *Patronizing the Hotel's guest areas*, including but not limited to: guest rooms, food & beverage outlets, and public restrooms and or

> hotel lobby *is strictly prohibited*. In the event that you wish to be in a guest area for nonwork related reasons *you must have prior authorization from General Manager*, Deputy General Manager or Director of Human Resources.
>
> Employees may not use the lobby, public restrooms and other public guest areas inside the Hotel unless on specific work assignments. Further, we ask that you meet your friends and family outside the Hotel. The lobby is where we serve our guests and should be used for this purpose only…. Nothing in this policy shall be construed in a manner to interfere with employee's rights under the National Labor Relations Act.

Id.[4] The ALJ found that these rules "do not explicitly restrict Section 7 activity" and "simply . restrict employee use of certain areas of the hotel to work-related purposes." Under such circumstances, the ALJ found that it was not "likely that employees would read these rules as limiting their Section 7 rights" because they only "prohibit[] patronizing the hotel as a customer" and "have an apparent business justification." *Id*.

Furthermore, the ALJ misinterpreted the holding of *Lafayette Park Hotel*, 326 NLRB at 827 which upheld the following rule similar to the one maintained by Marriott:

> Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.

Id. The *Lafayette Park Hotel* Board rejected the General Counsel's argument that the rule was unlawful because it allowed management to select which off-duty employees could use the premises, finding that the rule does not mention or implicate Section 7 activity and "a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity." *Id*. The Board concluded that "there are legitimate business reasons for such a rule, and we believe

[4] Although this case was addressed by the Board, the Board chose not to address this portion of the ALJ's decision.

that employees would recognize the rule for its legitimate purpose, and would not ascribe to it far-fetched meanings such as interference with Section 7 activity." *Id*.

Despite such clear language from the Board, the ALJ erroneously disregarded *Lafayette Park Hotel* by finding that its holding should be limited to restrictions placed on hotel food and beverage outlets. [Decision at 7:1-4.] However, nothing in the *Lafayette Park Hotel* opinion suggests that the holding should be limited in such a manner. In fact, the Board stated that because the rule "merely requires permission for 'entertaining friends or guests' . . . reasonable employee[s] would not interpret this rule as requiring prior approval for Section 7 activity." *Lafayette Park Hotel*, 326 NLRB at 827. Since food and beverage outlets are just one of the many places in which off-duty employees could "entertain friends or guests," the ALJ's limiting of the holding of *Lafayette Park Hotel* is incorrect.

The rules found to be valid in *Crowne Plaza Hotel* and *Lafayette Park Hotel* are no different than Marriott's "Returning to Work Premises" rule. If anything, Marriott's rule is more obviously protective of Section 7 rights because it specifically excludes outside non-working areas (in compliance with *Tri-County*):

> *Employees are not permitted in the interior areas of the Property* more than fifteen (15) minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the Property after your work shift is over or on your days off. On these occasions, *you must obtain prior approval from your manager*. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. *This policy does not apply to parking areas or other outside non-working areas*.

[Resp. Ex. 2, p.43 (emphasis added).] Similar to the cases described above, although the rule here requires an off-duty employee to obtain prior approval from management before returning to interior areas of the hotel, "a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity" because the rule does not in any way mention Section 7

activity. *Crowne Plaza*, 352 NLRB at 385; *Lafayette Park*, 326 NLRB at 827. Further, since Marriott excludes parking areas and other non-working areas from its restrictions, the rule would not be read by employees "to require them to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas." *Lafayette Park*, 326 NLRB at 827. A reasonable employee simply would not believe Marriott is undermining his/her Section 7 rights.[5]

2. The ALJ Improperly Interpreted The Holding Of Tri-County.

The ALJ essentially found that *Tri-County*, 222 NLRB at 1089, stands for the broad proposition that any no access rule (even one that specifically excludes outside non-working areas) is invalid if management has discretion to make limited exceptions because it would not be uniformly applied to all employees "seeking access to the plant for any purpose." [Decision at 5:7-17.] However, as explained, such an interpretation has been explicitly rejected in decisions such as *Crowne Plaza Hotel* and *Lafayette Park Hotel*.[6]

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[5] There are no substantive differences between the "Returning to Work Premises" rules in the two Marriott employee handbooks. The only differences are the substitution of the term "employees" for "associates" and the substitution of the term "hotel" for "property." Notwithstanding this minor difference, the ALJ improperly concluded that the term "property" in the revised rule "may be construed as a more expansive term" than use of the term "hotel" in the original rule. [Decision at 8:9-11.] However, the ALJ erroneously failed to consider the fact that both the original and the revised "Returning to Work Premises" rules specifically mention that the rules do not apply to "parking areas or other outside non-working areas." [Resp. Ex. 1, p.6; Resp. Ex. 2, p.43.] The ALJ also failed to address how Marriott employees would be "further" confused about the "scope of the access restriction rule" [Decision at 8:10-11] even though employees are clearly not excluded from using the parking areas and other outside non-working areas on the property.

[6] Since *Tri-County* only dealt with distribution of union literature by an employee *outside* of a hospital, even if the Board did opine on access to *interior* spaces, any such opinion is also dicta and not binding on the Board.

Recently, Region 21 requested ALJ William Kocol to strike down a rule preventing off-duty employees from entering the interior areas of a hospital unless they were visiting a patient or receiving medical treatment on the ground that it violated *Tri-County*. *Sodexo America, LLC*, 2011 WL 1356754 (2011). In rejecting such an overbroad interpretation of *Tri-County*, Judge Kocol stated:

> I conclude that this interpretation of *Tri-County* is too literal and results in consequences not intended by that decision. Under the General Counsel's interpretation, for example, a retail business could bar off-duty employees from its store only if it also banned them from shopping there; certainly the Board in *Tri-County* did not intend such a result. Likewise, in this case I conclude that the Board did not intend that a hospital could bar access only if it also barred its employees from becoming patients or visiting patients.

Id. at p. 3; *see also Tenet Healthsystem Hospitals, Inc.*, 2002 WL 31402769, p.13 (ALJ Parke 2002) ("Respondent's access rule specifically permits off-duty employees access to outside non-working areas of the hospital, and its prohibition is within the guidelines of *Tri-County* . . . . The rules apply to all off-duty employees except those visiting a patient . . . and are thus not protected-activity exclusive.").

This rationale applies equally to the hotel industry. Marriott's rules were drafted to account for reasonable instances when use of the hotel may be necessary after an employee's shift (*i.e.*, the employee does not have a ride home, needs to pick up a paycheck, etc.) or if the employee wants to use the hotel for his or her own enjoyment. Were the ALJ's understanding of *Tri-County* correct, employers would be required to draft more restrictive rules preventing off-duty employees from ever using the hotel on their time off. This would undoubtedly hurt employee morale and unnecessarily inconvenience employees, which was not the result intended by *Tri-County*.

Since no evidence was presented that Marriott applied the rules in a manner that restricted Section 7 activity, there is no reason why the Board should uphold the ALJ's decision which overturns Board precedent and interprets *Tri-County* in a manner which was not intended.[7]

B. The ALJ Improperly Concluded That Marriott's "Use Of Hotel/Property Facilities" Rule Is Unlawful.

The ALJ found that Marriott's "Use of Hotel Facilities" rule it is overbroad and does not ***specifically*** exclude parking areas and other exterior non-working areas from its restriction in violation of *Tri-County,* 222 NLRB at 1089. [Decision at 8:46-47; *see also* Decision at 9:34-39.] In reaching this conclusion, the ALJ failed to consider the undisputed evidence and misapplied Board law.

1. The ALJ Failed To Consider The Fact That Hotel Guests Are Not Entitled To Section 7 Rights.

Marriott's "Use of Property Facilities" rule pertains to off-duty employees who want to use hotel facilities like any other ***guest*** of the hotel. Under such circumstances, they would be treated like ***guests*** — not employees — and there would be no confusion regarding Section 7 rights because guests do not have such rights. *See Jurys Boston Hotel,* 356 NLRB No. 114, p. 15 (2011) (affirming ALJ's finding that rule prohibiting "patronizing the hotel as a ***customer***" does not violate the Act because it is not "likely that employees would read [the rule] as limiting their

[7] The ALJ also improperly concluded that Marriott's original and revised "Returning to Work Premises" and "Use of Hotel/Property Facilities" rules violate the Act because they were not clearly disseminated to all employees. However, the ALJ erroneously failed to consider that revised and substantially similar rules were distributed to all newly hired employees after November 2010. [Tr. 41, 43.] Marriott has hired over 100 employees since the revised handbook was issued and each of these new hires was provided the new handbook. [Tr. 43.] Under such circumstances, the original employee handbook would apply to all employees hired prior to November 2010 and the revised handbook would apply to all subsequently hired employees — there is no dispute that each subset of employees were properly informed of the employee handbook that applies to them.

Section 7 rights") (emphasis added). Since the ALJ failed to consider this critical fact, the conclusion that Marriott's "Use of Hotel Facilities" rule was unlawful should be reversed on this ground alone.

2. The ALJ Failed To Consider Marriott's Work Rules In Their Entirety.

The ALJ also incorrectly failed to consider the work rules at issues as a whole when it held that the "Use of Hotel Facilities" rule was invalid because it did not contain the same exclusion that appears in Marriott's "Returning to Work Premises" rule (*i.e.*, "this policy does not apply to parking areas or other outside non-working areas"). The Board does not allow parties to nitpick at various portions of workplace rules in order to find a violation. Indeed, the Board has consistently held that when determining whether a challenged rule is unlawful, it must "give the rule a reasonable reading," "*refrain from reading particular phrases in isolation*," and "not presume improper interference with employee rights." *Martin Luther*, 343 NLRB at 646; *Crowne Plaza*, 352 NLRB at 383; *see also Lafayette Park*, 326 NLRB at 825, 827.

Under these fundamental principles of interpretation, the ALJ, like any other reasonable employee, should have read the two similar workplace rules together and held that the exclusion for parking and other non-working areas would apply equally to both Marriott's "Returning to Work Premises" rule and its "Use of Property Facilities" rule. Any other interpretation would be impracticable because the rules go hand in hand. Since any off-duty employee who tries to use a hotel/property facility would by definition also be returning to the work premises, both rules would always apply and the employee would have to read the rules together.

Similarly, the principle that workplace rules should not be read in isolation must also be extended to Marriott's revised "Use of Property Facilities" rule in its L.A. Live Employee Handbook. The revised rule provides employees with further guidance regarding the scope of the rule:

> The Property and its *facilities are designed for the enjoyment of our guests* and residence owners. You are not permitted on guest or resident floors, rooms or elevators, in public restaurants, lounges, restrooms, or any other guest or resident facility unless on a specified work assignment or with prior approval from your manager. Permission must be obtained from your manager before utilizing any *Property outlet*, visiting family or friends *staying in the Property*, or *using any of the above mentioned facilities*. Please ensure that the manager of the area you intend to visit is aware of the approved arrangements. [Resp. Ex. 2, p.44.]

Since the revised rule specifically restricts access to guest facilities that are inside the property (*i.e.*, guest or resident floors, rooms, lounges, etc.), employees would not reasonably believe that they could not conduct Section 7 activity in parking areas and other exterior non-working areas.

3. The ALJ Erroneously Found That Marriott Has Outside Non-Working Areas In Direct Contravention Of The Record.

Without record support, the ALJ wrongfully concluded that the "undisputed record evidence shows that there are outside nonwork areas, such as the outside patio connected to the mixing-room bar area." [Decision at 8:43-44.] This simply is not so. The testimony from Marriott's Human Resources Director revealed that this exterior patio is an extension of the hotel's mixing-room bar because it is surrounded by a gate which separates it from the public. [Tr. 63-64.] The primary entrance to the patio is through the hotel itself, however, even if someone uses the external gate to enter this patio and sits at one of the tables in the patio, they would be considered a guest of the hotel and would be served by any available waiters/waitresses. [*Id*.] Clearly, the evidence shows that this outside patio is a guest facility located within Marriott's premises.

The evidence also establishes that parking areas and other outside non-working areas are inherently excluded from the scope of the restrictions in Marriott's "Use of Hotel/Property Facilities" rule. The rule is intended to limit employee use of facilities "which are designed for

the enjoyment of [Marriott] guests" such that sufficient space would be available for guests to use such facilities. [Resp. Ex. 1, p.6; Resp. Ex. 2, p.44; Tr. 44-45.] The evidence showed that "facilities designed for the enjoyment of guests" include "[a]nything that [Marriott] provide[s] for the comfort of [its] guests for their enjoyment as they're staying at [the] hotel and spending money" (such as "a spa, or a restaurant, or a bar, a fitness room"). [Tr. 51.] Therefore, by definition, employees would not be restricted from performing Section 7 activity in parking areas because it is not something that is specifically made for the "enjoyment" of guests during their stay at the hotel. It would be hard to imagine a guest wanting to enjoy their stay at the hotel by "hanging out" at the porte-cochere or in the underground valet-pick up area.[8]

Further, Marriott's L.A. Live property does not have any "facilities designed for the enjoyment of guests" outside of its building premises (i.e, pools, gyms, and/or spas are all within the confines of Marriott's building). [Tr. 58-59.] Since there are no guest facilities outside of Marriott's property, employees would also not be restricted from performing Section 7 activity outside of the building premises. Accordingly, the "Use of Property Facilities" rule complies with *Tri-County* because parking areas and other outside non-working areas would not be covered under its scope.

C. The ALJ's Interpretation Of Marriott's Work Rules Is Unreasonable And Contrary To Board Law.

As explained, the Board is not supposed to strain for interpretations of workplace rules just to find picayune alleged violations of the Act divorced from employees' real-world

[8] Marriott's L.A. Live property contains a guest valet drop-off area in front of its main entrance (also described as a porte-cochere). [Tr. 63.] The hotel also has an underground parking area (used by the valet) at which guests can claim their vehicles from the valet. [Tr. 65.] Marriott employees can not use the porte-cochere or the underground valet pick-up area for parking their own vehicles because they have their own employee parking lot a few blocks away from the hotel. [Tr. 65.]

experiences. The appropriate question for the Board is whether employees *would* reasonably construe the language in Marriott's two work rules to prohibit Section 7 activity, not *could*. *Lafayette Park*, 326 NLRB at 825.

Marriott respectfully submits that no reasonable employee would read the two alleged work rules to prohibit Section 7 activity because they say nothing and are not in any way related to Section 7 activity. Furthermore, the ALJ failed to consider the following key undisputed facts which negate his conclusion that Marriott's rules are unlawful: (1) there is no evidence that Marriott applied the rule in a manner that restricted the exercise of Section 7 rights; (2) there is no evidence that Marriott promulgated the rules in response to union activity; (3) there is no evidence that even a single employee ever believed the rules prohibit Section 7 activity; and (4) there is no evidence that Marriott has ever disciplined any employee for conducting Section 7 activity on or off of its property. These key facts were never addressed by the ALJ and are critical because they directly contradict the ALJ's conclusion that employees would somehow construe the rules to prohibit Section 7 activity. In light of all these facts, it would be unreasonable for an employee to read the challenged workplace rules and think to himself, "gee, I had better not conduct any union activity on or off hotel property, or I'll get in trouble." Neither the employees nor the Board is required to check their common sense at the door. In this regard, the ALJ seems to have forgotten the Board's advice: "Work rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law." *Martin Luther*, 343 NLRB at 648.

The ALJ also failed to consider the fact that Marriott has several legitimate business reasons for maintaining the rules at issue, including (1) ensuring sufficient space for guests to use hotel facilities [Tr. 44-45], (2) preventing off-the-clock employees from disrupting or interfering

with the work of employees that are on-the-clock [Tr. 46], (3) limiting potential accidents and workers' compensation claims involving off-the-clock employees [Tr. 45, 57], and (3) limiting potential wage-hour and other legal liabilities in the event that a guest seeks assistance from off-duty employees who may still be in uniform. [*Id*.] Under these circumstances, "employees would recognize the rule[s] for [these] legitimate purpose[s], and would not ascribe to [them] far-fetched meanings such as interference with Section 7 activity." *Lafayette Park*, 326 NLRB at 827.

Moreover, the ALJ even failed to consider Marriott's open door policy, which provides that employees can ask managers about interpretation of any rule:

> This handbook is presented as a matter of information only and cannot and do[es] not describe all the circumstances and situations in which [employees] might find themselves, nor does it describe all policies and procedures that might affect the employment relationship. If you have any questions about this handbook or any other aspect of your employment, *please contact a manager for clarification*.

[Resp. Ex. 1, p. 4; Resp. Ex. 2, p. 3 (emphasis added).] Similarly, both of Marriott's employee handbooks also provide that employees may raise any complaints or concerns with management:

> We recognize that, being human[,] mistakes may be made in spite of our best efforts. We want to correct such mistakes as soon as they happen. The only way we can do this is to know of your problems and complaints.
>
> NO MEMBER OF MANAGEMENT IS TOO BUSY TO HEAR THE PROBLEMS OR COMPLAINTS OF ANY [EMPLOYEE]. [Resp. Ex. 1, p. 21; Resp. Ex. 2, p. 35.]

Therefore, when the ALJ finds — in a vacuum — that employee Section 7 rights would be chilled by language that allegedly is overbroad, it is important to note that employees readily and simply can clarify any alleged uncertainly regarding the language through Marriott's open door policy, which is part and parcel of the Company's policies. The ALJ fails to address why a

"reasonable" employee would allegedly believe that Section 7 activity is prohibited without first asking management about how the rule should be interpreted. Marriott cannot be expected to consider and take into account every potential possibility for employee confusion in its handbooks — if it did, employees would have to wade through hundreds of pages of legalistic language which is likely to result in even more confusion.

Notwithstanding the foregoing key facts disregarded by the ALJ which negate his conclusions, the Board's cases demonstrate a clear reluctance to find legal violations in handbook rules that do not explicitly address Section 7 activity:

> We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it. . . . [W]here, as here, the rule *does not* address Section 7 activity, the mere fact that it could be read in that fashion will not establish its illegality. We . . . decline to parse through workrules, viewing phrases in isolation, and attributing to employers an intent to interfere with employee rights, in order to divine ambiguities that will render such rules unlawful.

Fiesta Hotel Corporation, 344 NLRB 1363, 1368 (2005). Similarly, the D.C. Circuit has also made clear that the Board "may not cavalierly declare policies to be facially invalid without supporting evidence, particularly where, as here, there are legitimate business purposes for the rule in question and there is no suggestion that anti-union animus motivated the policy." *Adtranz ABB Daimler-Benz Transp., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001).

V. CONCLUSION

For the foregoing reasons, the ALJ's findings and conclusions had no basis in fact or in law and should not be adopted by the Board. The Amended Complaint should be dismissed.

Dated: September 9, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2011, a copy of **Respondent's Brief In Support Of Exceptions To The Administrative Law Judge's Decision** was submitted by e-filing to the National Labor Relations Board. I further certify that I emailed the foregoing document to the following in accordance with Board Rules & Regulations Rule 102.114(i):

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